



REPUBLIC OF KENYA



**In re Estate of Karisi Getanguthi (Deceased) (Succession Cause
364 of 2008) [2023] KEHC 23915 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23915 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 364 OF 2008
LM NJUGUNA, J
OCTOBER 18, 2023**

BETWEEN

**ALICE GICUKU 1ST APPLICANT
NJIRU NJINE 2ND APPLICANT
JOHN NYGA 3RD APPLICANT
EMILIO NJERU 4TH APPLICANT**

AND

**SILVANO NJIRU NJERU 1ST RESPONDENT
NJIRU JOTHAM NJERU 2ND RESPONDENT**

RULING

1. For determination is the summons dated 27th July 2023 through which the applicants seek the following orders:
 - a. Spent;
 - b. Stay of execution of the warrants to give vacant possession and notice to vacate in Runyenjes SPMCC No. E003 of 2021 and E004 of 2021 pending the hearing and determination of this application;
 - c. Stay of execution and use of grant confirmed on 25th February 2013 pending hearing and determination of this application;
 - d. Stay of execution and use of grant confirmed on 25th February 2013 pending hearing and determination of the application for revocation of grant herein;



- e. The respondents, their agents, servants and/or employees be restrained from evicting the applicants from land parcels Gaturi/Nembure/16109, Gaturi/Nembure/14624 and Gaturi/Nembure/16110 pending the hearing and determination of this application and the application for revocation of the grant;
 - f. The costs of this application be provided for.
2. The 1st applicant is the mother of the 2nd, 3rd, 4th applicants and the 1st respondent and widow of the deceased. In her supporting affidavit, the 1st applicant contested the distribution of the estate as per the certificate of confirmation of grant issued on 25th February 2013 stating that it is not possible that she would be given a smaller portion of land than her sons, even though she has been living on that land with her husband until the time he died. That the 1st respondent undertook subdivision of the property and then disposed a portion of it by way of sale to the 2nd respondent who now seeks to displace her. That she only learned of the eviction orders given in *Runyenjes ELC* case no. E003 and E004 of 2021, many days after their timeline had lapsed and they are in the process of seeking leave to appeal these orders out of time. She deposed that she is old and poor and if she is rendered homeless, she has nowhere else to go. That the land should have been subdivided according to how they occupy it on the ground. That she is seeking to be allocated her rightful share and without having to relocate her.
 3. The respondents filed a replying affidavit stating that the 1st applicant was present in court when the distribution of the estate was done and that she cannot purport to bring this application more than 10 years later. That when the estate was subdivided, the 1st applicant refused to sign the land processing documents forcing the 1st respondent to seek orders that the court execute on her behalf and have the titles processed on behalf of the beneficiaries as per the certificate of confirmation of grant. That this court marked the matter as closed and no appeal has been filed against the finding of the court since then. That the applicants were warned of the impending eviction but they did nothing about it until the auctioneers went to enforce the court orders in the Runyenjes case. In a further reply, the respondents stated that the application had been overtaken by events and that it has been 10 years and the estate has already been devolved. That the application has not met the threshold set under Section 76 of the *Law of Succession Act*.
 4. In response to the replying affidavit, the applicants filed another affidavit stating that even though they did not appeal against the findings of the court, the land was still not subdivided according to the agreed distribution. That the issue is how the subdivision of the property was done on the land itself regardless of the information on the certificate of confirmation of grant and that the 1st respondent wants to displace her yet she is the widow of the deceased. That she seeks for the grant to be revoked since it was acquired illegally as per the relevant law.
 5. The application was canvassed by way of written submissions and both parties filed their written arguments.
 6. It was the applicants' submission that the grant was procured illegally and by misrepresentation or concealment of facts and to the wrong person. That the resultant certificate of confirmation of grant is also in dispute as the property has since been mismanaged by the administrators. That following issuance of the certificate of confirmation, the 1st respondent proceeded to sell the land to the 2nd respondent in a manner that the 2nd respondent has more land than all the beneficiaries of the estate. The 1st applicant submitted that the warrants of bailiffs seeking to evict the applicants, if effected, will displace them and they are all old and poor without means to start a new life elsewhere. That they live on the land according to the wishes of the deceased and that the court erred in inequitably granting her a smaller portion because she is a woman. That the 1st respondent took advantage of the 1st applicant's



illiteracy and old-age and subdivided the property wrongly. That the revocation of grant is necessary so that justice can be served.

7. The respondents submitted that the portions of land namely Gaturi/Nembure/16109, Gaturi/Nembure/14624 and Gaturi/Nembure/16110 emanate from subdivision of Gaturi/Nembure/3661 which was subdivided as such. That the titles were issued to the respondents once the transfer forms were signed by the Deputy Registrar when the administrators of the estate refused to sign them. That the present application has been brought more than 10 years after the certificate of confirmation of grant and that the court should not entertain it especially since no appeal has been filed against the said orders. It is their case that the application does not fit within the tenets of section 76 of the Law of Succession Act or Rule 63 of the Probate and Administration Rules. That the ownership of the titles by the respondents has never been challenged under the Land Registration Act by the applicants in the Environment and Land Court. They also submitted that the applicants do not deserve the costs of this application.
8. In my view, the only issue for determination is whether the application herein meets the threshold for granting stay of execution of orders in Runyenjes SPMCC No. E003 of 2021 and E004 of 2021.
9. Applications for stay of execution are governed by Order 42 rule 6(2) of the Civil Procedure Rules which provides:
 - “No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
10. Stay of execution may be granted where the court is satisfied that substantial loss will result if the order is not granted, the application has been brought without delay and security for specific performance has been provided (see the case of Antoine Ndiaye Vs African Virtual University (2015) eKLR). In the present case, the applicants have not demonstrated any of these 3 grounds. The subject of this application is an impugned grant and the subsequent distribution of the estate which was done in the year 2013 and a certificate of confirmation of grant was issued. The proceedings in Runyenjes SPMCC No. E003 of 2021 and E004 of 2021 are a consequence of this distribution, which has since not been contested on appeal neither has it been set aside.
11. The court in these two matters has issued warrants of eviction against the applicants. I am aware that the applicants have preferred to challenge the orders of the lower court on appeal. In the case of James Wangalwa & Another Vs Agnes Naliaka Cheseto [2012] eKLR, the court held that:
 - “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of



substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

12. As far as issuing the stay of execution orders is concerned, my hands are tied as the application does not in any way meet the threshold envisioned in the law.
13. Therefore, I find that the summons dated 27th July 2023 lacks merit and is hereby dismissed but with no orders as to costs.
14. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF OCTOBER, 2023.

L. NJUGUNA

JUDGE

.....for the Applicants

.....for the Respondents

